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No. 86-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN SLADE,

Petitioner,

v.

THE UNITED STATES OF MEXICO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Foreign Sovereign Immunities Act of 1976 apply retroactively to confer subject matter jurisdiction over the United States of Mexico with respect to actions transacted between 1922 and 1951?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENIAL OF THE WRIT	4
I. THE QUESTION PETITIONER SEEKS TO RAISE IS PLAINLY WITHOUT MERIT BECAUSE MEXICO WAS ABSOLUTELY IMMUNE FROM SUIT IN THE UNITED STATES PRIOR TO THE PASSAGE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976	6
II. THE DECISION BELOW, WHICH CORRECTLY DECLINED RETROACTIVE APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, NEITHER CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS NOR PRESENTS AN UNSETTLED ISSUE OF LAW THAT THIS COURT SHOULD RESOLVE	7
CONCLUSION	8

TABLE OF AUTHORITIES

PAGE

CASES

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 5

Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926). 5

Chisholm v. Georgia, 2 Dall. 419 (U.S. 1793) 6

Corporacion Venezolana de Fomento v. Vintero Sales Corp., 477 F. Supp. 615 (S.D.N.Y. 1979, *aff'd in part and rev'd in part*, 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) 7

Edelman v. Jordan, 415 U.S. 651 (1974) 6

Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D. 2d 927, 233 N.Y.S.2d 1013 (1st Dep't 1962) 5

In re Investigation of World Arrangements, Etc., 13 F.R.D. 280 (D.D.C. 1952) 5

Jackson v. The People's Republic of China, 596 F. Supp. 386 (N.D. Ala. 1984), *aff'd* 794 F.2d 1490 (11th Cir. 1986) 7, 8

Lamont v. Travelers Insurance Co., 281 N.Y. 362, 24 N.E.2d 81 (1939) 4, 6

National City Bank v. Republic of China, 348 U.S. 356 (1955) 5

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 6

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 5

Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) 5

STATUTES

28 U.S.C. § 1330, 1602-11 ..... *passim.*

PAGE

TREATISES, LAW REVIEWS

Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 Am. J. Int'l L. 399 (July 1977) 6

Note, *Sovereign Immunity*, 18 Harv. Int'l L.J. 429 (1977) 4

von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Trans. L. 33 (1978) 6

6 Whiteman, *Digest of International Law*, § 20 (1968) 4

OTHER AUTHORITIES

26 Department of State Bulletin, 678 (1952) 5

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent the United States of Mexico, defendant below, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision in this case by the Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the District Court granting defendant's motion for summary judgment is reported at 617 F. Supp. 351 (D.D.C. 1985). The Court of Appeals affirmed on the opinion below, 790 F. 2d 163 (D.C. Cir. 1986). Because the District Court opinion is not accurately reproduced at pages 11-47 of the Petition, citations in this brief will be to the published opinion of the District Court at 617 F. Supp. 351.

STATEMENT OF THE CASE

The material facts are set forth in the opinion of the District Court, 617 F. Supp. at 351-55, based on affidavits and documents submitted in support of the motion for summary judgment, and have not been contested by petitioner (*see* 617 F. Supp. at 354, footnote 9). The facts may be briefly summarized.

Petitioner brought this action to recover the face amount of certain "Receipts for Interest in Arrears" which he claims (erroneously) were issued by respondent pursuant to agreements made in 1922. The history of these "receipts" is traceable to the period from 1886 to 1910, when the Mexican government, certain municipalities and privately owned railroads issued bonds which were sold worldwide. In 1914 payments on all of these bonds were suspended as a result of civil unrest in Mexico. Subsequently, a voluntary committee of international bankers (the "Committee") was organized for the purpose of negotiating resumption of payment of the bonds (617 F. Supp. at 351-52).

The Committee and Mexico ultimately reached an agreement in 1922 which included a waiver of interest and arrears of interest due the bondholders as of January 2, 1923. The 1922 agreement also included a plan under which the government of Mexico would pay to the Committee sums sufficient to retire such unpaid interest by 1968, and a provision under which holders of coupons for unpaid interest on the bonds could deposit the coupons with the Committee and, pursuant to a separate agreement with consenting bondholders, the Committee would issue "Receipts for Interest in Arrears". In the event that Mexico was unable to make sufficient payments to the Committee under the 1922 agreement (as amended in 1925), the depositors could recover their interest coupons from the Committee and resume their contractual rights against the original public and private issuers of the bonds (617 F. Supp. at 352-53).

The Committee received more than $45 million from Mexico pursuant to the 1922 plan and 1925 modification.

However, in 1928 Mexico again suspended payments to the Committee because of social and economic conditions in that country. In 1942 and 1946 the Committee negotiated agreements with Mexico under which holders of "Receipts for Interest in Arrears" could receive payments, at less than face value, directly fom Mexico (617 F. Supp. at 353).

The District Court noted that, in actions commenced in 1932 and 1952, the New York state courts made the following findings of fact and conclusions of law: (i) the Committee was not an agent of Mexico, (ii) the government of Mexico was not a party to the separate agreement made in 1922 between the Committee and bondholders pursuant to which the "Receipts for Interest in Arrears" were issued, (iii) the coupons deposited with the Committee in exchange for the receipts had no substantial monetary value, (iv) the Committee was authorized to destroy the coupons after publication of appropriate notice, and (v) the Committee was thereupon discharged of any further obligation to the receiptholders or bondholders (617 F. Supp. at 354). The District Court concluded that:

> Based on the foregoing facts, [footnote omitted] it is clear that, as a matter of substantive contract law, plaintiff cannot recover money due on receipts for interest arrears issued under the 1922 Deposit Agreement. However, Mexico has not moved to dismiss or for summary judgment on this ground. Rather, it argues that this Court lacks jurisdiction over it under the doctrine of sovereign immunity (617 F. Supp. at 354-55).

The District Court granted Mexico's summary judgment motion on the ground that the Foreign Sovereign Immunities Act ("FSIA") could not be applied retroactively to confer subject matter jurisdiction over Mexico.* After noting that the

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* Respondent also argued below that dismissal was required because (i) Mexico's acts in negotiating the 1922, 1925, 1942 and 1946 agreements with the Committee did not constitute "commercial activity" under the FSIA, and (ii) the requisite "minimum contracts" are not present to support jurisdiction in the United States. The District Court did not reach these issues.

FSIA "provides the sole basis for subject matter jurisdiction over suits against foreign states [citations omitted]" (617 F. Supp. at 355), the Court observed that retroactive application of statutes is disfavored (617 F. Supp. at 356), and that prior to 1952 "the United States recognized and adhered to the theory of absolute sovereign immunity" (617 F. Supp. at 357).

Because the District Court found no support for retroactive application in the statutory language and legislative history of the FSIA, and because applying the FSIA to the underlying transactions would prejudice the antecedent rights of Mexico, the District Court held that

> Retroactive application of the Act would repudiate the immunity of foreign sovereigns for transactions predating 1952 and thus be inconsistent with Congress' intent not to affect the substantive law of liability.

(617 F. Supp. at 357) and that it would be "inequitable to divest Mexico of the absolute immunity it enjoyed in 1922 by applying the FSIA to this case" (617 F. Supp. at 358).

REASONS FOR DENIAL OF THE WRIT

I

THE QUESTION PETITIONER SEEKS TO RAISE IS PLAINLY WITHOUT MERIT BECAUSE MEXICO WAS ABSOLUTELY IMMUNE FROM SUIT IN THE UNITED STATES PRIOR TO THE PASSAGE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The doctrine of foreign sovereign immunity provides that no state may claim jurisdiction over another. Under the traditional theory, a foreign sovereign's immunity from suit was absolute unless the sovereign consented to suit. 6 Whiteman, *Digest of International Law*, § 20 at 553 (1968); Note, *Sovereign Immunity*, 18 Harv. Int'l L.J. 429 (1977); *Lamont v. Travelers Insurance Co.*, 281 N.Y. 362, 369, 24 N.E.2d 81, 82 (1939). The United States first adopted this traditional rule in

the 19th century in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Although *The Schooner Exchange* concerned the seizure of a military vessel, the principle of absolute immunity was later extended to all acts, including commercial acts, of a foreign state. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

It was not until 1952 that the "restrictive" theory of sovereign immunity—which postulates that a foreign sovereign may engage in various forms of conduct that are not within its governmental functions and, consequently, are not deserving of immunity—was formally adopted by the Executive Branch with the issuance of the "Tate Letter". 26 Department of State Bulletin, 678 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976).

The Tate Letter provided little guidance for the application of its "governmental/private act" dichotomy, however. Consequently, courts applied a variety of tests to determine the immunity question. *See, e.g., Et Ve Balik Kurumu v. B.N.S. Int's Sales Corp.*, 25 Misc. 2d 299, 303, 204 N.Y.S.2d 971, 977 (Sup. Ct. 1960), *aff'd*, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (1st Dep't 1962); *In re Investigation of World Arrangements, Etc.*, 13 F.R.D. 280, 290-91 (D.D.C. 1952). But even after the advent of the "restrictive" theory in 1952, the courts continued to regard the issuance of public debt as a governmental function and therefore subject to the rule of immunity. *See, e.g., National City Bank v. Republic of China*, 348 U.S. 356 (1955); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

It was only through the enactment of the FSIA in 1976 that Congress altered the law and for the first time characterized the issuance of public debt as a commercial activity. Congress rejected the traditional approach, and decided that the issuance of public debt for foreign sovereigns should be treated as a commercial transaction, not subject to the doctrine of sovereign

immunity. *See* Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 Am.J.Int'l L. 399, 405 (July 1977); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Trans. L. 33, 49 (1978) n.69.

Petitioner relies on *Chisholm v. Georgia*, 2 Dall. 419 (U.S. 1793) for the proposition that a foreign sovereign may be sued by a citizen (Petition at 6). *Chisholm*, however, decided the issue of state sovereign immunity rather than the issue of foreign sovereign immunity. Moreover, in *Edelman v. Jordan*, 415 U.S. 651, 662 (1974), this Court recalled that the *Chisholm* decision "literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams." The Eleventh Amendment overruled *Chisholm*, "but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of soverign immunity limits the grant of judicial authority in Article III". *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984).

The principle of sovereign immunity is reiterated in the other case cited by petitioner, *Lamont v. Travelers Insurance Co.*, 281 N.Y. 362, 363, 24 N.E.2d 81, 82 (1939) (Petition at 4), which stated that "[t]he Government of Mexico is, of course, immune from suit here." Recovery for repudiation of a contract or for injury inflicted without any justification by a foreign sovereign could not be granted by the courts without the consent of that sovereign (*Id.* at 84). This doctrine was not changed until the passage of the FSIA in 1976.

Thus, there can be no question that under the common law doctrine of sovereign immunity as it existed prior to 1976, respondent is absolutely immune from suit in any court in the United States based on the claim asserted by petitioner in this action. Even under the "restrictive" theory of sovereign immunity announced by the State Department in 1952, and even if petitioner's "receipts" constituted public debt obliga-

tions of the Mexican Government (which they do not), this action would be barred because prior to the FSIA the courts held that public loans constituted a governmental activity to which immunity would continue to attach.

II

THE DECISION BELOW, WHICH CORRECTLY DECLINED RETROACTIVE APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, NEITHER CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS NOR PRESENTS AN UNSETTLED ISSUE OF LAW THAT THIS COURT SHOULD RESOLVE

The decisions of the District Court and the Court of Appeals rejecting retroactive application of the FSIA provisions governing subject matter jurisdiction are in accord with the other federal courts that have considered the issue. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 629 F.2d 786, 791 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Jackson v. The People's Republic of China*, 596 F. Supp. 386 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986). The FISA has never been used by any court to confer subject matter jurisdiction over pre-1952 transactions. Thus, there is no split in authority for this Court to resolve, and no need for this Court to address the issue.

For more than a century, the United States granted foreign nations absolute immunity from suit in the nation's courts (*Jackson*, *supra*, at 1492). This doctrine was not questioned until the Executive Branch adopted a more "restrictive" theory of sovereign immunity in 1952. The United States should not, by a change in its domestic law, retroactively abrogate the internationally accepted principle of sovereign immunity.

In short, there is no reason for this Court to grant the petition for certiorari in this case. Petitioner's claim against respondent is patently defective and subject to summary dismissal on at least four separate grounds. The decisions of the courts below in this action are consistent with all of the cases

which have considered the issue, and there is no authority in support of petitioner's contention. And finally, the opinion of the District Court in rejecting retroactive application of the FSIA reflects the policy of the United States Government as set forth in the "Statement of Interest" signed by attorneys of the Department of State and the Department of Justice and filed in *Jackson v. The People's Republic of China, supra.*

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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November 26, 1986